(27,681)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 337.

EUGENE SOL LOUIE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 19, 1920.

1–5 In the United States Circuit Court of Appeals for the Ninth Circuit.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Transcript of the Record.

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

6 *Names and Addresses of Attorneys of Record.*

R. E. McFarland, W. B. McFarland, Cœur d'Alene, Idaho, Attorneys for Plaintiff in Error.

J. L. McClear, U. S. District Attorney; J. R. Smead, Assistant District Attorney, Boise, Idaho, Attorneys for Defendant in Error.

7 In the District Court of the United States within and for the District of Idaho, Northern Division, May Term, 1919.

No. 1534.

UNITED STATES OF AMERICA

vs.

EUGENE SOL LOUIE, Defendant.

Indictment.

Charge Murder. Violation Section 273, Penal Code.

The Grand Jurors of the United States of America, being first duly impaneled and sworn, within and for the District of Idaho, Northern Division, in the name and by the authority of the United States of America, upon their oaths do find and present:

That heretofore, to-wit: On or about the 24th day of May, A. D. 1919, in the County of Benewah in the Northern Division of the District of Idaho, and in and upon Indian country, to-wit, within the limits of a certain Indian Reservation, to-wit, the Cœur d'Alene Indian Reservation in said Division and District, and in the
8 State of Idaho, Eugene Sol Louie, who was then and there a Cœur d'Alene Indian theretofore declared competent by the duly qualified authorities of the Department of Indian Affairs, and who then and there was a member of the Cœur d'Alene tribe of Indians by reason of the fact that he then and there had in common

with all other members of said tribe an interest in certain tribal funds thereafter to be disbursed to the members of said tribe, including the said Eugene Sol Louie, by the United States of America, then and there unlawfully, wilfully, feloniously and of his deliberately premeditated malice aforethought made an assault upon one Adaline Bohn Sol Louie, a human being, with a knife, hammer and other deadly weapons to the Grand Jurors unknown, and did then and there unlawfully, wilfully and feloniously and of his deliberately premeditated malice aforethought strike, cut, bruise, beat and maim, the said Adaline Bohn Sol Louie, inflicting on the said Adeline Bohn Sol Louie in, about and upon her head, mortal wounds, of which the said Adeline Bohn Sol Louie then and there died, she, the said Adeline Bohn Sol Louie, being then and there a member of the Cœur d'Alene tribe of Indians and a ward of the United States living in and upon the aforesaid Cœur d'Alene Indian Reservation, and in the charge of the Superintendent of said Reservation;

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the said Eugene Sol Louie in the manner and form aforesaid did unlawfully, wilfully and feloniously, and of his deliberately premeditated malice aforethought, kill and murder the said Adeline Bohn Sol Louie, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. R. SMEAD,
Assistant United States Attorney for the District of Idaho.

C. A. ANDERSON,
Foreman of the United States Grand Jury.

Witnesses Examined Before the Grand Jury in the Above Case.

Pascal George, Mrs. Joe Seltice, Joe Seltice, Prentice Wolf, Dr. Eugene W. Hill.

(Endorsed:) No. 1534. In the District Court of the United States, District of Idaho, Northern Division. United States of America vs. Eugene Sol Louie, Defendant. Indictment, Murder. A True Bill. C. A. Anderson, Foreman.

Presented by the Foreman in open court and filed in the presence of the Grand Jury this 29th day of May, 1919.
W. D. McREYNOLDS,
Clerk.

At the May, 1919, term of the District Court of the United States for the District of Idaho, Northern Division, held at Cœur d'Alene, among others, the following proceedings were had on the days shown herein.

Present: Hon. Frank S. Dietrich, Judge.

Thursday, May 29th, 1919.

(Title of Cause.)

Arraignment and Plea.

Comes now the District Attorney with the defendant and Messrs. McFarland & McFarland, his counsel, into court, the defendant to be arraigned upon the indictment charging him with the crime of murder. The indictment was read to the defendant by the Clerk, who furnished him with a true copy thereof, upon order of the Court. The Court asked the defendant if the name by which he was indicted was his true name, and the defendant replied in the affirmative.

The defendant waived time in which to plead, whereupon, the Court asked the defendant if he pleads guilty or not guilty
11 of the offense charged in the indictment, and the defendant pleaded not guilty. The Court set the cause for trial at ten o'clock a. m. Wednesday, June 4th, 1919, and remanded him to the custody of the Marshal, to appear at that time.

Thursday, June 5th, 1919.

(Title of Cause.)

Motion for Dismissal.

This cause came regularly on for trial before the Court and a jury, the defendant being present with his counsel, Messrs. McFarland & McFarland and R. B. Norris, Esq., the United States being represented by J. L. McClear, District Attorney and J. R. Smead, Esq., his assistant.

* * * * * * *

The indictment was read to the jury by the District Attorney, who informed them of the defendant's plea of not guilty, heretofore entered thereto. Morton D. Colgrove was sworn and examined as a witness on the part of the United States. Counsel for the defendant here stated that he desired to make a motion without the presence of the jury; whereupon, the Court admonished the jury, then excused them, and they retired from the room. Counsel for the defendant then moved the Court to dismiss the cause, for want of jurisdiction. The said motion was argued by counsel, and taken under advisement by the Court.

* * * * * * *

12 Whereupon, the Court after admonishing the jury, excused them until 9.30 o'clock a. m. June 6th, 1919, continuing further trial herein until that time.

Friday, June 6th, 1919.

(Title of Cause.)

Order Denying Motion to Dismiss.

The trial of this cause was resumed before the Court and jury, counsel for the United States, the defendant and his counsel being present, it was agreed that the jurors were all present.

* * * * * * *

The Court at this time announced his decision upon the defendant's motion to dismiss, denying the same; to which order the defendant excepted.

* * * * * * *

Whereupon, the Court, after admonishing the jury, excused them until 9.30 o'clock a. m. June 7th, 1919, continuing further trial herein until that time.

(Title of Court and Cause.)

Verdict.

We, the jury in the above entitled cause, find the defendant Eugene Sol Louie guilty of murder (as charged) in the second degree.

EDWIN E. KYLE,
Foreman.

Endorsed: Filed June 7, 1919. W. D. McReynolds, Clerk.

13 (Title of Court and Cause.)

Motion in Arrest of Judgment.

And now after verdict against the said defendant and before sentence, comes the said defendant in his own proper person, and by McFarland & McFarland, his attorneys, and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons, to-wit:

1. Because this Honorable Court has not jurisdiction of the person of said defendant, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America to conduct and transact his own affairs and business and protect himself and property, and because the evidence

clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W. ½) of the Southeast quarter (SE. ¼), and the East One-half (E. ½) of the Southwest quarter (SW. ¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto.

14 2. That this Honorable Court has not jurisdiction of the crime charged against said defendant or the subject matter thereof, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America, to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W. ½) of the Southeast quarter (SE. ¼), and the East One-half (E. ½) of the Southwest quarter (SW. ¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto, because of which said errors in the record herein, no lawful judgment can be rendered by the Court upon the record in this cause.

McFARLAND & McFARLAND,
Attorneys for Defendant.

P. O. Address: Coeur d'Alene, Idaho.

Service of the above and foregoing motion in arrest of judgment by receipt of a true copy thereof at Coeur d'Alene, Idaho,
15 this 12th day of June, 1919, is hereby admitted.

J. L. McCLEAR,
U. S. District Attorney.

Endorsed: Filed June 13, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Judgment.

Now, on this 13th day of June, 1919, the United States District Attorney, with the defendant and his counsel, Messrs. McFarland & McFarland, came into Court; the defendant was duly informed by the Court of the nature of the indictment found against him for the

crime of murder, committed on the 24th day of May, A. D. 1919, of his arraignment and plea of "Not guilty as charged in said indictment," of his trial and the verdict of the jury on the 29th day of May, A. D. 1919, "Guilty as charged in the indictment." The defendant was then asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of murder,

It is hereby considered and adjudged that the said defendant, Eugene Sol Louie, be imprisoned in the United States Penitentiary, at McNeil Island, Washington, for the term of Twelve (12)
16 Years and it is further ordered and adjudged that said defendant be and is hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Title of Court and Cause.)

Bill of Exceptions.

Be it remembered, that on the 5th day of June, A. D. 1919, being one of the days of the May term of said Court, this cause came on to be heard before His Honor, Judge Frank S. Dietrich, one of the judges of said court, and a jury therein duly sworn to try said cause, the defendant having theretofore been duly and regularly arraigned in person and pleaded not guilty to said indictment, J. L. McClear, United States Attorney, and J. R. Smead, Assistant United States Attorney, appearing for plaintiff, and R. E. McFarland and R. B. Norris, appearing as attorneys for defendant, and the United States to maintain the issues on its part, called as witnesses divers persons, who being duly sworn testified in said cause.

Be it further remembered, that upon the trial of said cause, the United States called as as a witness, one M. D. Colgrove, who being duly sworn testified as follows:

My name is M. D. Colgrove. I live at the Agency on the Coeur d'Alene Indian Reservation. Sorrento, Idaho, is our post office. It is a mile and a half from the Agency. I am superintendent
17 of that reservation, and have been superintendent nine years the 5th of November. I know the defendant, Eugene Sol Louie. He is an Indian of the Coeur d'Alene tribe.

Be it further remembered, that the following interrogatories were propounded to said witness, to which he made the following answers:

Q. What is his present status with relation to that tribe, as to whether or not he is still a ward of the Government, that is, whether he has been declared competent to manage his own affairs, or whether he is a ward of the Government yet?

A. He has been given a patent in fee, which is supposed to be obtained through being competent.

Q. Referring to that patent in fee that you mentioned, you mean he has been given a patent in fee to certain land that was on the reservation there?

A. Yes, sir.

Q. On the Coeur d'Alene Indian Reservation?

A. Yes, sir.

Q. Prior to obtaining that patent in fee, was he interested in that land, and if so, in what way?

A. He had a trust patent for it prior to that.

Q. By that you mean the United States held that land in trust for him?

A. Yes, sir.

Q. Now has the defendant at the present time any interest in any funds later to be disbursed to the Coeur d'Alene tribe or to the individual members of that tribe, rather, by the United States
18 through your office?

A. Yes.

Q. He still has an interest in such funds?

A. Yes, sir.

Q. Were you acquainted with the woman mentioned in this indictment as having been killed, Adeline Sol Louie, Adeline Bohn Sol Louie?

A. Yes, sir.

Q. What was her status prior to her death? Was she a ward of the Government or not?

A. Yes, sir, she was a ward.

Q. By that you mean she had never been declared competent and had never received any patent in fee for any allotment?

A. Yes, sir, that is what I mean.

Q. And she remained in that status up to the time of her death?

A. Yes, sir.

Be it further remembered, that said witness continued to testify upon examination by the United States Attorney, as follows:

Eugene Sol Louie has no lineal descendants, or any children. He has a father and mother living on the reservation. They are Coeur d'Alene Indians and wards of the Government in my charge. The land to which Eugene Sol Louie received the patent lies within the Coeur d'Alene reservation. That is, the limits prior to the time the last cession was made. These facts existed on the first of May, 1919. He had gotten his patent before that time.

19 Be it further remembered, that said witness continued to testify upon cross-examination by R. E. McFarland, as follows:

I know the description of the land patented by the Government to the defendant. It is the West Half of the Southeast quarter and the East Half of the Southwest quarter of Section 11, Township 44

North of Range 5 West. All of the land that was formerly the Cœur d'Alene Indian Reservation and not ceded was not allotted to the Indians. There are no Indians on that reservation to whom allotments have not been made by the Government, except those born since May 2, 1910. There are no tribal lands on that reservation at all. The status of the land is all of the land that had not been allotted was opened to settlement on May 2, 1910, and of that land that was open to settlement, there is about 18,000 acres that has not been settled upon. That is yet open. It all lies within the reservation as we get the maps from the Indian Department. The reservation is shown, its shape. Part of it is in blue for the allotments, and the rest of it in white, showing that it was land that was opened to settlement. I know of the death of Adeline Sol Louie. She was residing on the land that was patented to the defendant at the time of her death.

Be it further remembered, that said witness continued to testify upon redirect examination by Mr. Smead, as follows:

This 18,000 acres that has not been settled on, was included in the cession by the Cœur d'Alene tribe back to the United States. They are interested in this way. They get the money it would sell for. The land itself is owned by the Government and platted and thrown open to entry by the white people. The Indian lands now consist of the individual allotments in severalty to the members of the tribe and certain townsites on the reservation.

Be it further remembered, that the witness continued to testify upon examination by the court, as follows:

The townsites are owned by the Government and they are sold by the general land office and the money goes into a fund that is to be distributed pro rata among the Indians. The proceeds arising from the sale of this 18,000 acres is turned over to the Indians, and divided among them per capita. The Government holds the title to that land in fee simple now. By this cession of which I spoke, the Indians relinquished their rights to it and when the patents come to the purchasers, they are made direct to the purchaser from the United States. The price of the land is fixed by an appraising commission. Every forty acres is appraised at a certain price. There is a proviso, however, that if the land was not sold by a certain period, the land might be sold at any valuation it might bring. This 18,000 acres consisted of land on top of the mountain peaks, which no one considered desirable and it still remains unsold.

Be it further remembered, that to the following questions propounded by the Court, the witness made the following answers:

Q. What supervision do you exercise over the defendant here, he having a patent to his land? Do you exercise any control over him at all?

A. No, sir, the only thing I have to do is with his part of the money that is in the United States Treasury that is yet unpaid. We have had one distribution and he has received his share of that.

Q. That is a part of this common fund you mean that arises from the sale of this land?

A. Yes, sir.

Q. As to this particular allotment, he lives on that and does as he pleases?

A. Yes, sir, he was living on that and was making arrangements to farm a portion of it.

Q. And if he wanted to rent it, he could rent it?

A. Yes, sir.

Q. Or sell it?

A. Yes, sir. He could sell it.

Be it further remembered, that said witness was dismissed from the witness stand, and thereupon United States Assistant Attorney, Mr. Smead, and R. E. McFarland and R. B. Norris, the attorneys for the defendant, stipulated in open court as follows:

That the injuries to Adeline Bohn Sol Louie and mentioned in the indictment, were sustained by her upon the land mentioned in the testimony of said witness Colgrove, viz., the West Half of the Southwest quarter and East Half of the Southwest quarter of Section 11, Township 44, North of Range — West, which prior thereto had been patented in fee to the defendant, and that after re-
22 ceiving such injuries, she was removed from said lands to the allotment of one Nancy Lawrence Moctelme, where she died.

Be it further remembered, that thereupon the defendant, by his counsel, made the following objection and motion:

Upon the testimony of the witness Colgrove, and the stipulation made and entered into by the respective counsel in open court, and the further statement of the District Attorney that there would be no further or additional evidence offered with reference to the status of the defendant or the lands allotted to him and testified to be the witness Colgrove, the defendant objects to any further testimony in this case, and moves that the case be dismissed, for the reason that this court has no jurisdiction of the case, for the reason that the testimony clearly shows that the defendant is not an Indian under the control or superintendency of an Indian Agent or Superintendent; that he has been declared and adjudged by the Government and the proper authorities of the Government as competent to manage his own affairs, and that a patent to lands lying upon the so-called Cœur d'Alene Indian Reservation has been allotted to him, and that the injuries received by the deceased Adeline Bohn Sol Louie were received by her upon these lands so patented to the defendant, and that they are not within or properly speaking a part of the Cœur d'Alene Indian Reservation.

23 Be it further remembered, that the court reserved his ruling upon said objection and motion, and took the same under

advisement, pending the hearing of further testimony, and thereupon E. W. HILL was called by the United States as a witness, and after being duly sworn, testified as follows:

That he is in the employ of the Government at Desmet, Idaho, as medical officer for the Indian Service, Cœur d'Alene Indians, and that he had been in such service for about two and a half years; that he had been in the Government service for twelve years; that he was at Tensed, Idaho, on the 5th of May; that he received a telephone call from the Mission requesting him to go there to see a young woman that was seriously injured, and that he arrived there about a quarter of eight on May 5th. He found a girl practically unrecognizable from wounds; he recognized her as Adeline Sol Louie, the wife of Gene Sol Louie, the defendant. She was at the house of Nancy Lawrence, in a small room. That he is the official physician for the United States Government in the Indian Service, and was appointed by the Indian Bureau. He is paid a salary and for that compensation he serves the Indians without charge. It would be his duty to serve any Indian on the reservation without charge. The territory covering his employment is officially known and referred to as the Cœur d'Alene Indian Reservation.

24 Be it further remembered, that said witness was excused and M. D. COLGROVE was by the United States recalled and testified further upon examination by J. L. McClear, United States Attorney, as follows:

By a treaty stipulation with the Cœur d'Alenes, the United States agrees to provide a physician and blacksmith and a carpenter, and medicines for the Cœur d'Alenes and for that purpose, and embodied in the Indian bill, there is appropriated annually the sum of $3,000.00. The duties of the physician under that is, to take care of all of the Indians. The physician cares for all the Indians, and the blacksmith does the work, and the carpenter does the work of the Indians on the reservation. However, by agreement, the carpenter has been changed to lease clerk, so that the money that formerly paid the carpenter's salary, now pays the lease clerk. This money is paid from an appropriation made by Congress known as the Cœur d'Alene Support. That takes care of all of the Indians in that way within the limits of the old reservation; all of the Indians on our census roll. The census roll includes both the allotted Indians and the Indians that have received patent, and all. That roll contains the names of all emancipated Indians.

Be it further remembered, that said witness continued to testify upon examination by the Court, as follows:

25 The place where the deceased died is not on the defendant's allotment. It is in the townsite. Nancy Moctelme bought three lots and houses in the townsite of Tensed, and the girl had been removed there before I got out. The defendant's wife, who died, had not been emancipated in any formal way. Her land is still under trust. Her allotment is still under trust. This land in the townsite,—these lots, are not held in trust. They have been

built on and sold. They have town lot sales, and these lots have been sold and patented and patents issued to purchasers, and she purchased. I don't know whether it was the first exchange, but she purchased from someone who purchased from the Government. She bought this property after the property had been sold and houses erected thereon. She bought the houses and lots.

Be it further remembered, that said witness was excused from the witness stand, and other witnesses were called by the United States, sworn and testified, after which the Government rested.

Be it further remembered, that no other or further testimony or proof was introduced, had, taken or given upon the trial of said cause, with reference to the status of the defendant, Eugene Sol Louie, or with reference to the status of the deceased, Adeline Bohn Sol Louie, at the time of the commission of the alleged crime, or at any other time, and that no other or further testimony was
26 produced, had, taken or given upon the trial of said cause with reference to the place where the said Adeline Bohn Sol Louie received the injuries from which she died.

Be it further remembered, that at the conclusion of the Government's evidence and after the Government rested, the defendant, by his counsel, renewed the objection and motion above stated, and the Court overruled and denied said objection and motion, to which ruling the defendant, by his counsel, then and there duly excepted and an exception was duly allowed by the Court, and the defendant assigns such ruling as error.

And thereupon the defendant to maintain the issues on his part, called witnesses, who were duly sworn and testified. Here the defendant rested and the Government rested.

And thereupon the Court charged the jury, and said cause was argued to the jury by respective counsel.

And thereupon the jury rendered a verdict of guilty of murder in the second degree against said defendant.

Be it further remembered, that upon the trial of said cause, the evidence upon behalf of the United States and the defendant both, clearly showed that at the time of the commission of the crime charged in the indictment herein, and of which defendant was convicted as aforesaid, and for some time prior thereto, the de-
27 fendant had been declared competent by the duly qualified authorities of the Department of Indian Affairs, to transact his own business and affairs, and that a patent had been issued to him by the United States for the West Half of the Southeast quarter, and the East Half of the Southwest quarter of Section Eleven, Township Forty-four North of Range Five West, in fee, and that the deceased, Adeline Bohn Sol Louie, was a Cœur d'Alene Indian,

a ward of the Government, and was residing upon said lands with defendant and that she received the injuries from which she died, on said lands, and that after sustaining said injuries and before her death, she was removed to the home of Nancy Lawrence Moctelme, on patented lots in the townsite of Tensed, Idaho, where she died.

Be it further remembered, that after the rendition of the verdict of the jury aforesaid, and upon the defendant's being arraigned in open court for judgment and sentence, the defendant by his counsel, moved the Court to arrest judgment upon said verdict as follows:

And now after verdict against the said defendant and before sentence, comes the said defendant in his own proper person, and by McFarland & McFarland, his attorneys, and moves the Court here to arrest judgment herein and not pronounce the same for the following reasons, to-wit:

1. Because this Honorable Court has not jurisdiction of the person of said defendant, because the indictment shows upon the
28 face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian affairs of the government of the United States of America to conduct and transact his own affairs and business and protect himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W. ½) of the Southeast quarter (SE. ¼) and the East One-half (E. ½) of the Southwest quarter (SW. ¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defendant, and the said defendant then and there held title in fee thereto.

2. That this Honorable Court has not jurisdiction of the crime charged against said defendant or the subject matter thereof, because the indictment shows upon the face thereof that prior to the commission of the crime charged, the defendant was not a ward of the government, had been emancipated and adjudged and declared competent by the duly qualified authorities of the Department of Indian Affairs of the government of the United States of America, to conduct and transact his own affairs and business and protect
29 himself and property, and because the evidence clearly shows that the assault committed and the injuries inflicted upon the said Adeline Bohn Sol Louie, the deceased, and of which she died, were committed and inflicted upon her at and upon the West One-half (W. ½) of the Southeast quarter (SE. ¼), and the East One-half (E. ½) of the Southwest quarter (SW. ¼) of Section Eleven (11), Township Forty-four (44) North of Range Five (5) West, and that at said time said lands and the whole thereof had been patented by the government of the United States to the said defend-

ant, and the said defendant then and there held title in fee thereto, because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this cause. Which said motion was denied by the court, to which ruling of the court the defendant then and there duly excepted and assigns said ruling as error.

And thereupon the court rendered its judgment and sentence upon said verdict, which judgment and sentence is as follows:

That the defendant, Eugene Sol Louie, be imprisoned in the United States Prison at McNeil's Island, State of Washington, at hard labor for the period of twelve years.

And for as much as the evidence and proceedings and matters of exceptions above set forth, do not fully appear of record, the defendant, by his attorneys, tenders this bill of exceptions and prays
30 that the same be signed and sealed by the court here pursuant to the statute in such case made and provided;

Which is done accordingly this 9th day of July, A. D. 1919.

FRANK S. DIETRICH,
Judge.

Stipulation for Settlement of Bill of Exceptions.

It is hereby agreed and stipulated by and between the plaintiff and defendant in the above entitled action, that the above and foregoing bill of exceptions is a true and correct bill of exceptions in said case, and may be settled, signed and sealed by the court as such without any other or further notice to either of the parties hereto.

Dated this 8th day of July, A. D. 1919.

J. L. McCLEAR,
United States District Attorney.
R. E. McFARLAND,
Attorney for Defendant.

Service of the foregoing Bill of Exceptions, by receipt of a true copy thereof at Boise, Ada County, State of Idaho, this 5th day of July, A. D. 1919, is hereby admitted.

J. L. McCLEAR,
United States District Attorney
for the District of Idaho.

Endorsed: Filed July 9, 1919. W. D. McReynolds, Clerk, by Pearl E. Zanger, Deputy.

31 (Title of Court and Cause.)

Petition for Writ of Error.

And now comes Eugene Sol Louie, defendant herein, by McFarland & McFarland, and R. E. McFarland, his attorneys, and says that on the 13th day of June, A. D., 1919, this court entered judg-

ment herein against this defendant on a verdict of the jury returned on the 7th day of June, A. D. 1919, upon an indictment charging the defendant with murder in violation of Section 273 of the Penal Code, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors, which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United State- Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

EUGENE SOL LOUIE,
By McFARLAND & McFARLAND AND
R. E. McFARLAND,
Attorneys for Defendant.

Service of the foregoing petition for Writ of Error by receipt of a true copy thereof at Boise, Idaho, this 16th day of July,
32 1919, is hereby admitted.

J. L. McCLEAR,
U. S. District Attorney, Attorney for Plaintiff.

Endorsed: Filed July 16, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Assignment of Errors.

Eugene Sol Louie, defendant in the above entitled cause, by McFarland & McFarland and R. E. McFarland, his attorneys, in connection with his petition for a writ of error, makes the following assignments of error, which he alleges occurred upon the trial of said cause:

1. The indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States.

2. The indictment herein shows upon the face thereof that this court has not jurisdiction of the person of the defendant.

3. The indictment herein shows upon the face thereof, that this court has not jurisdiction of the subject of this cause or action.

4. The trial court erred during the progress of the trial, in overruling defendant's objection to the admission of any further testimony, after the conclusion of the testimony of Dr. E. W. Hill,
33 for the reason that the evidence disclosed the fact that the defendant was an emancipated Indian, had received his patent in fee, and that the injuries sustained by the deceased, and from

which she died, was inflicted upon her upon the lands patented to the defendant by the United States, and this court has not jurisdiction of said cause.

5. The trial court erred in over-ruling and denying defendant's motion to dismiss this cause at the conclusion of the testimony of said witness Hill, for the reason that the evidence disclosed the fact that the defendant was an emancipated Indian, had received his patent in fee, and that the injuries sustained by the deceased, and from which she died, was inflicted upon her upon the lands patented to the defendant by the United States, and this court has not jurisdiction of said cause.

6. The trial court erred at the close of the testimony for the United States in over-ruling and denying defendant's motion to dismiss said cause, for the reason that the evidence clearly shows that at the time of the commission of the crime charged, the defendant had been declared by the Indian Department of the United States, competent to manage his own business and affairs, had been emancipated and there had issued to him a patent for the lands included in an allotment previously made by the United States to him, and that the crime charged was committed upon said lands, and not upon an Indian Reservation, and that the injuries or wounds received
34 by the deceased, and of which she died, was received upon said lands and premises, and not upon an Indian Reservation, and that the deceased died upon patented land, and not upon an Indian Reservation, and the court did not have jurisdiction over the person of the defendant, or the subjects of said action.

7. The trial court erred in denying the motion in arrest of judgment on behalf of defendant, in this, that the indictment shows upon the face thereof that this court has not jurisdiction of the defendant, for the reason that he has been declared or adjudicated competent to transact his own business and affairs.

That the testimony shows that the defendant, prior to the commission of the crime charged, was a Cœur d'Alene Indian, but had been declared and adjudicated competent to transact his own business, had been duly emancipated and had received from the United States a patent in fee to certain lands situated upon the Cœur d'Alene Indian Reservation, and that the injuries received by the deceased, and from which she died, were sustained upon said lands and premises, after the defendant had been so emancipated, and received said patent, and that the deceased died upon other patented lands and not upon the Cœur d'Alene Indian Reservation, and that the trial court, for the above reasons, did not have jurisdiction of the
35 subject of the action, or of the person of the defendant.

EUGENE SOL LOUIE,
Defendant,
By McFARLAND & McFARLAND AND
R. E. McFARLAND,
Attorneys for Defendant.

Service of the foregoing Assignment of Errors by receipt of a true and correct copy thereof, at Boise, Idaho, this 16th day of July, 1919, is hereby admitted.

J. L. McCLEAR,
U. S. District Attorney, Attorney for Plaintiff.

Endorsed: Filed July 16, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Order Allowing Writ of Error on Appeal.

On this 2nd day of August, A. D. 1919, comes Eugene Sol Louie, above named, by his attorneys, McFarland & McFarland and R. E. McFarland, and files herein and presents to the court, a petition for the allowance of a writ of error on appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit and assignment of errors intended to be urged by said defendant, Eugene Sol Louie, in said court, praying also that a transcript of the record, pro-
36 ceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such order and further proceedings may be had as may be proper in the premises.

In consideration whereof the court does now here allow the writ of error as prayed.

Done in open court this 2nd day of August, A. D. 1919, by the court.

FRANK S. DIETRICH,
U. S. District Judge in and for the District of Idaho.

Endorsed: Filed Aug. 2, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the District Court of the United States for the District of Idaho, Northern Division, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a cause which is in the said District Court before you, or some of you, between the United States, plaintiff, and Eugene Sol Louie, defendant, manifest error has happened to the great damage of the said Eugene Sol Louie, defendant, as by his complaint ap-
pears, we being willing that error, if any, should be duly cor-
37 rected and full, speedy justice done to the party aforesaid in this behalf, do command if judgment be given therein, that then under your seal distinctly and openly you send the record and

proceedings aforesaid with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you may have the same at San Francisco, in said circuit, on the 1st day of September, A. D. 1919, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct the errors what of right and according to the laws and customs of the United States should be done.

Witnes the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 2nd day of August, in the year of our Lord Nineteen hundred and nineteen, and of the Independence of the United States, One hundred and forty-two.

FRANK S. DIETRICH,
U. S. District Judge, District of Idaho.

Attest:

W. D. McREYNOLDS, [SEAL.]
Clerk U. S. District Court,
District of Idaho.

Endorsed: Filed Aug. 21, 1919. W. D. McReynolds, Clerk.

38 (Title of Court and Cause.)

Citation.

The President of the United States to the above named plaintiff, and to J. L. McClear, United States District Attorney, attorney for plaintiff:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in said Circuit, on the 1st day of September A. D. 1919, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Eugene Sol Louie is plaintiff in error, and you are attorney for the defendant in error, to show cause if any there be, why judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to parties in that behalf.

Witness the Honorable Frank S. Dietrich, Judge of the District Court of the United States, for the District of Idaho, this 2nd day of August, A. D. 1919, and of the Independence of the United States One Hundred Forty-two.

FRANK S. DIETRICH,
District Judge.

Attest:

W. D. McREYNOLDS, [SEAL.]
Clerk.

Acceptance of Service of Citation.

I hereby, this 2nd day of August, A. D. 1919, accept due personal service of the foregoing Citation, on behalf of the United
39 States of America, defendant in error.

J. L. McCLEAR,
United States District Attorney,
Attorney for the United States.

Endorsed: Filed Aug. 2, 1919. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Præcipe for Record.

To W. D. McReynolds, Clerk of the above entitled court:

You are hereby respectfully required to transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, a printed transcript of the following papers constituting the record in this action on appeal, viz., indictment, plea of not guilty to indictment, verdict of the jury, defendant's bill of exceptions, motion in arrest of judgment, judgment, objection to introduction of further testimony, and motion to dismiss case, made during progress of trial, and all appeal papers, with the original Citation and Writ of Error.

McFARLAND & McFARLAND AND
R. E. McFARLAND,
Attorneys for Defendant.

P. O. Address: Coeur d'Alene, Idaho.

Endorsed: Filed July 21, 1919. W. D. McReynolds, Clerk.

40 *Return to Writ of Error.*

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit and the same is transmitted accordingly.

W. D. McREYNOLDS,
[SEAL.] *Clerk.*

(Title of Court and Cause.)

Clerk's Certificate.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 40, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled

cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as Requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $48.35, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 9th day of August, 1918.

W. D. McREYNOLDS,
Clerk.

[SEAL.]

[Endorsed:] Printed Transcript of Record. Filed August 15, 1919. F. D. Monckton, Clerk.

41 & 42 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

43 At a Stated Term, To wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room Thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and nineteen.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable Erskine M. Ross, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

No. 3380.

EUGENE SOL. LOUIE, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Order of Submission.

Ordered above-entitled cause argued by Mr. Ora A. McFarland, counsel for the plaintiff in error, and by Mr. James L. McClear, United States Attorney, counsel for the defendant in error, and submitted to the Court for consideration and decision.

44 At a Stated Term, To wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of April, in the year of our Lord, one thousand nine hundred and twenty.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.

No. 3380.

EUGENE SOL. LOUIE, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Order Directing Filing of Opinion and Dissenting Opinion and Filing and Recording of Judgment.

Ordered, that the opinion this day rendered by this Court, as well as the Dissenting Opinion of the Honorable Erskine M. Ross, United States Circuit Judge, in the above-entitled cause be forthwith filed by the Clerk, and that a Judgment be filed, and recorded in the Minutes of this Court in said cause in accordance with said opinion.

45 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL. LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error to the United States District Court for the District of Idaho, Northern Division.

Before Gilbert, Ross and Hunt, Circuit Judges.

Opinion U. S. Circuit Court of Appeals.

HUNT, *C. J.*:

Sol Louie brought writ of error to review conviction of murder in the second degree for having killed Adeline Louie, a Coeur d'Alene Indian and a ward of the United States, about May 24, 1919, in Benewah County, Idaho, alleged to be in an Indian country within the limits of the Coeur d'Alene Indian Reservation in Idaho.

The indictment is drawn under section 328 of the Penal Code, 1910, which provides that any and all such Indians committing murder "against the person or property of another Indian or other person within the boundaries of any State of the United States and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the same courts and in the same manner
46 and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It is alleged that Louie was a Coeur d'Alene Indian, who had theretofore been declared competent by the authorities of the Department of Indian Affairs and that he was a member of the Coeur d'Alene tribe of Indians, by reason of the fact that he then and there had, in common with all other members of said tribe, an interest in certain tribal funds thereafter to be disbursed to the members of said tribe, including Louie.

These facts appeared upon the trial. Louie was given a patent in fee to certain lands in the Coeur d'Alene Indian Reservation. Prior to receiving his patent he had a trust patent upon the land, the United States holding the land in trust for him. Adeline Louie was a ward of the Government and had never been declared competent and never had received any patent in fee for allotment. The land patented is within the boundaries of the Coeur d'Alene Indian Reservation as the limits of such reservation were prior to the time the last cession was made. There are no tribal lands on the Coeur d'Alene Reservation and all lands that had not been allotted were open to settlement on May 2, 1910. At the time of the assault the woman

was living on the land that was patented to Louie, but her death occurred upon a lot which had been patented to another person. There were 18,000 acres of land which had never been settled upon
47 and which were included in the cession by the Cœur d'Alene tribe back to the United States, the Indians having an interest in these lands to the extent that they will get the money to accrue from the sale thereof. The land itself, however, is owned by the United States and is thrown open and platted by white people. What are called Indian lands now consist of the individual allotments in severalty to the members of the tribe and certain townsites on the reservation. By the cession of the 18,000 acres the Indians relinquished their rights to the land and when the patents are issued they are made direct to the purchasers from the United States. Louie has had his share of the one distribution already made of the proceeds of sales of part of the 18,000 acres. He lived on the land included in the allotment to him and had power to rent or sell the land. The patent to Louie was issued under the provisions of the Act of May 8th, 1906, (Ch. 2348, 34 Stat. 182), amending Section 6 of the Act of February 8th, 1887. It provides that at the expiration of the trust period and when the lands have been conveyed to the Indian by patent in fee, as provided by Section 5 of the Act, "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. * * * Provided the Secretary of the Interior, may in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to
48 such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuance of such patent; provided, further, that until the issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; and provided, further, that the provisions of this Act shall not extend to any Indian in the Indian Territory." (Barnes Fed. Code, p. 801, Sec. 35,981.)

Counsel agree in their respective briefs that the only question presented by the record for determination is whether the District Court had jurisdiction of the crime charged and over the person of the defendant below.

In our opinion this court has no jurisdiction to review the judgment of the District Court. The question of the construction of that portion of the Act of March 3d, 1891 (26 Stat. 826, Sec. 238 Judicial Code, 1913), which provides that appeals and writs of error may be taken from the District Court direct to the Supreme Court in any case in which jurisdiction of the court is in issue, has often been considered, and the view which obtains is that in order that the Circuit Court of Appeals may entertain the writ of error there must be in the case something more than the question of jurisdic-

tion. This Court so held in Excelsior Wooden Pipe Company vs. Pacific Bridge Co. et al., 109 Fed. 497. See, also, Halpin vs. Amerman, 138 Fed. 548; Boston & M. R. Co. vs. Gokey, 149, Fed.
49 42; Smith vs. Farbenfabriken of Elberfeld Co., 203 Fed. 476.

In United States ex rel. Butterwoth & Lowe vs. Sessions, Judge, 205 Fed., 502, the Court of Appeals for the Sixth Circuit said that where only a question of jurisdiction of the District Court is involved the Circuit Court of Appeals has no power either upon error or appeal to review the decision of the District Court. "The remedy lies exclusively in the Supreme Court. (Remington vs. Central Pacific R. Co., 198 U. S. 95, 97, 25 Sup. Ct. 577, 49 L. Ed. 959; Olds vs. Herman H. Hettler Lumber Co., 195 Fed. 9, 11, 115 C. C. A. 9*k* (C. C. A. 6th Cir.); Coler vs. Grainger County, 74 Fed. 16, 21, 20 C. C. A. 267 (C. C. A. 6th Cir.); Loveland, App. Jur., Sec. 103, p. 222); but if the case should be tried on its merits in the court below, and brought to this court with assignments of error raising an independent question of general law, this court would have power to hear and determine all the questions (see cases cited, and A. J. Phillips Co. vs. Grand Trunk Western Ry. Co., 195 Fed. 12, 15; 115 C. C. A. 94 (C. C. A. 6th Cir.); Smith vs. Farbenfabriken of Elberfeld Co., (C. C. A.), 203 Fed. 476, 478, (C. C. A. 6th Cir.)." Hammond Lumber Co. vs. U. S. District Court, 240 Fed. 924; Great Northern R. Co. vs. Blaine County, 252 Fed. 548.

The writ must be dismissed for lack of jurisdiction.

Dismissed.

[Endorsed:] Opinion. Filed April 5, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

50 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Dissenting Opinion of Ross, C. J.

Ross, *Circuit Judge,* Dissenting:

I am unable to agree to the judgment dismissing the writ of error for lack of jurisdiction in this court, in view of the fact that the record shows that the first assignment of error is in these words:

"The indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States."

Subsequent assignments of error are to the effect that the Court below was without jurisdiction of the person of the defendant or of the crime charged.

In view of the first assignment of error above quoted, I am unable to understand how it can be properly said and held that the plaintiff in error intended by his assignments to raise no other question than the question of jurisdiction of the Court below. If the Court below did have jurisdiction of the defendant and of the crime charged, would not this Court be obliged, in the event it should be of
51 the opinion that the indictment did not state facts sufficient to constitute the alleged crime, to reverse the judgment? It seems to me that there can be but one answer to that. And because it is manifest from a reading of the indictment that it does state facts sufficient to constitute the alleged crime, is that any legal or just reason why the Court should hold that the plaintiff in error did not intend by his assignment to present the question of the sufficiency of the indictment? In my opinion, surely not.

I therefore think it clear that the record brought here presents both the question of the sufficiency of the indictment and of the jurisdiction of the Court below. And being of the further opinion that the Court below was without jurisdiction, I think the judgment should be reversed and the case remanded with directions to dismiss the indictment.

The Act of Congress of May 8, 1906 (34 Stat. 182), under which the plaintiff in error was allotted and received a patent in fee for his piece of land expressly declares that each and every such allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which he may reside; and that the purpose of such provision was to thereafter exclude such an allottee from the operation of the criminal laws of the United States seems to be emphasized by the proviso to section 6 of the same Act, in which proviso it is expressly declared that until the issuance of such fee simple patents all allottees for whom a trust patent should thereafter be issued shall be subject to the exclusive jurisdic-
52 tion of the United States. In the Celestine Case (215 U. S. 278) there was not in the statute there involved, as there is in the one here involved, as will be seen near the conclusion of the Court's opinion on page 291, "a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

[Endorsed:] Dissenting Opinion of Rose, C. J. Filed April 5, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the District of Idaho, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division, and was duly submitted.

53 On consideration whereof, it is now here ordered and adjudged by this Court, that the writ of error in this cause be, and hereby is dismissed for the lack of jurisdiction.

[Endorsed:] Judgment. Filed and entered April 5, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record, Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-three (53) pages, numbered from and including 1 to and including 53, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 27th day of April, A. D. 1920.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

55 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Eugene Sol Louie is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Idaho, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
56 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of June, in the year of our Lord one thousand nine hundred and twenty. JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27681. Supreme Court of the United States, No. 926, October Term, 1919. Eugene Sol Louie vs. The United States of America. Writ of Certiorari. Docketed. No. 3380. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun- 21, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

57 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated that the certified transcript of record on file in the Supreme Court of the United States with the petition for the

writ of certiorari, in Case No. 337, Eugene Sol Louie, Petitioner, v. United States of America, Respondent, on docket for the October Term, 1920, be taken, deemed and considered as a return to said writ of certiorari, and that no other or further return of said writ of certiorari be or is required herein.

Dated this 16th day of June, A. D. 1920.

(Sgd.) ROBERT E. McFARLAND,
Counsel for Eugene Sol Louie, Plaintiff in Error.
(Sgd.) WILLIAM L. FRIERSON,
Solicitor General.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed June 28, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

58 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 28th day of June, A. D. 1920, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of June, A. D. 1920.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

59 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," in which said Stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 28th day of June, A. D. 1920.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of June, A. D. 1920.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By PAUL P. O'BRIEN,
Deputy Clerk.

60 [Endorsed:] File No. 27681. Supreme Court U. S., October Term, 1920. Term No. 337. Eugene Sol Louie, Petitioner, vs. The United States of America. Writ of certiorari and return. Filed July 8th, 1920.

NO. 337

In The Supreme Court of The United States

October Term, 1920

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals Ninth Circuit.

MOTION ON BEHALF OF PETITIONER TO ADVANCE

ROBERT EARLY McFARLAND,
Coeur d'Alene, Idaho,
Counsel for Petitioner.

NO. 337

In The Supreme Court of The United States

October Term, 1920

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

Motion for Petitioner to Advance

Now comes Eugene Sol Louie, the above named petitioner, and respectfully moves this Honorable Court to advance the above entitled cause for hearing upon its merits, at such specified time as this Honorable Court may seem meet and convenient.

STATEMENT.

The petitioner, Eugene Sol Louie, was indicted in the District Court of the United States within and for the District of Idaho, Northern Division, at the May term 1919 thereof, for the crime of murder, in having killed Adeline Bohn Sol Louie, his wife, on the Coeur d'Alene Indian Reservation within the District of Idaho, Northern Division, on the 24th day of May, 1919. A mistake occurs in the indictment setting forth that the killing was on the 24th day of May, 1919, whereas it should have been

on the 4th day of May, 1920. On the 5th day of June, 1919, his case was tried to a jury, and on the 7th day of that month, the jury by its verdict found him guilty of murder of the second degree.

During the progress of the trial, the testimony developed the facts that petitioner at the time of the commission of the alleged crime was a member of the Coeur d'Alene tribe of Indians, but had been emancipated, and had received a patent in fee to certain lands situated within the boundaries of the Coeur d'Alene Indian Reservation in Benewah County, State of Idaho, and had been adjudged and declared competent by the duly qualified authorities of the department of Indian Affairs of the United States, to conduct and transact his own affairs and business; that the crime of which he was charged and convicted, occurred upon the lands theretofore patented to him in fee by the government; that Adeline Bohn Sol Louie, whom he was charged and convicted of having killed, was his wife and a ward of the government.

These facts being shown conclusively by the evidence, petitioner moved the trial court for a dismissal. The motion was denied. After verdict and before judgment, the petitioner made, filed, submitted and argued a motion in arrest of judgment, which was denied, and thereupon on the 13th day of June, 1919, judgment was pronounced against him, adjudging that he be imprisoned in the United States penititentiary at McNeil's Island in the State of Washington, for the term of twelve years. Thereafter

and within the time provided by law, petitioner sued out a writ of error from the Honorable United States Circuit Court of Appeals, Ninth Circuit, to said District Court, assigning as error: FIRST, that the indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States, and SECOND, that the court below was without jurisdiction of the person of defendant, or of the crime charged, and had not jurisdiction to try, hear or determine said cause.

The cause came duly and regularly on for hearing in the Circuit Court of Appeals at the October Term, 1919, and after oral argument by respective counsel, was submitted.

Thereafter, on to-wit, April 5th, 1920, the Honorable Circuit Court of Appeals, by a majority of the Justices thereof, announced and handed down their opinion and decision dismissing the writ of error, and holding and deciding that that court was without jurisdiction to hear and determine said cause, and that your petitioner's writ of error should have been sued out of the Supreme Court of the United States, the Honorable Justice Ross dissenting, and by his opinion and decision announced, handed down and filed, held that that court had jurisdiction to hear and determine the cause, and that the lower court was without jurisdiction and the judgment thereof should be reversed and the case remanded with directions to dismiss the indictment.

Thereafter and within due time, a petition for a writ of ceriorari was presented to this Honorable Court, and based upon the grounds that the Honorable Circuit Court of Appeals had jurisdiction to hear and determine his cause, and that it was error to dismiss his writ of error, for the reason that in addition to the question of the jurisdiction of the trial court to try, hear and determine the case, there was submitted by the assignments of error presented to the Honorable Circuit Court of Appeals, the question as to the sufficiency of the indictment, and the claim that the indictment was insufficient and does not state facts sufficient to constitute or charge anv crime against the laws of the United States, nor anv offense under Section 273 of the Penal Code of the United States. The writ of ceriorari was granted by this Honorable Court on the 7th day of June, 1920.

REASONS FOR APPLICATION TO ADVANCE.

We respectfully submit that this cause should be advanced for the following reasons:

First. Petitioner was within a short time after judgment was pronounced upon him, committed to and imprisoned in the federal prison at McNeil's Island in the State of Washington, where he has since remained, up to the present time, by reason of said judgment of conviction and sentence.

SECOND. In addition to having been indicted and tried in the United States District Court for the District of Idaho, Northern Division, for said crime of murder, a criminal complaint was lodged before a magistrate with-

in and for Benewah County, State of Idaho, against petitioner, charging him with the same crime of murder, and that said cause is now pending, and should it be held by this Honorable Court that the District Court did not have jurisdiction to try the cause, and that the indictment herein should be dismissed and petitioner discharged, petitioner will be tried for said crime in the state court, and under the laws of the State of Idaho, and is entitled to a speedy trial, and without unnecessary delay; that in the event that this cause is not speedily determined in this Honorable Court, but that this Honorable Court does finally find favor of petitioner, and petitioner is thereafter tried in the state courts of Idaho, great delay and inconvenience will result and no doubt the ends of justice will be defeated, for by reason of the lapse of time, witnesses, both for the state and petitioner, may become scattered and difficult to obtain upon the trial of the cause.

THIRD. That if the United States District Court for the District of Idaho had not jurisdiction of said cause, petitioner is illegally confined and imprisoned and restrained of his liberty and should be released and discharged under and from said void judgment of conviction as speedily as possible.

FOURTH. That it is highly important and of great public interest, that the following provision of the Act of May, 1906, C. 2348, (34 Stat. 182; Barnes Federal Code, p. 801, Sec. 35981), be construed by this Honorable Court, viz:

"At the expiration of the trust period and when

the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; Provided, further that until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; and provided further, that the provisions of this Act shall not extend to any Indians in the Indian Territory."

In connection with the facts involved in this particular case.

Respectfully submitted,

ROBERT EARLY McFARLAND,

Coeur d'Alene, Idaho,

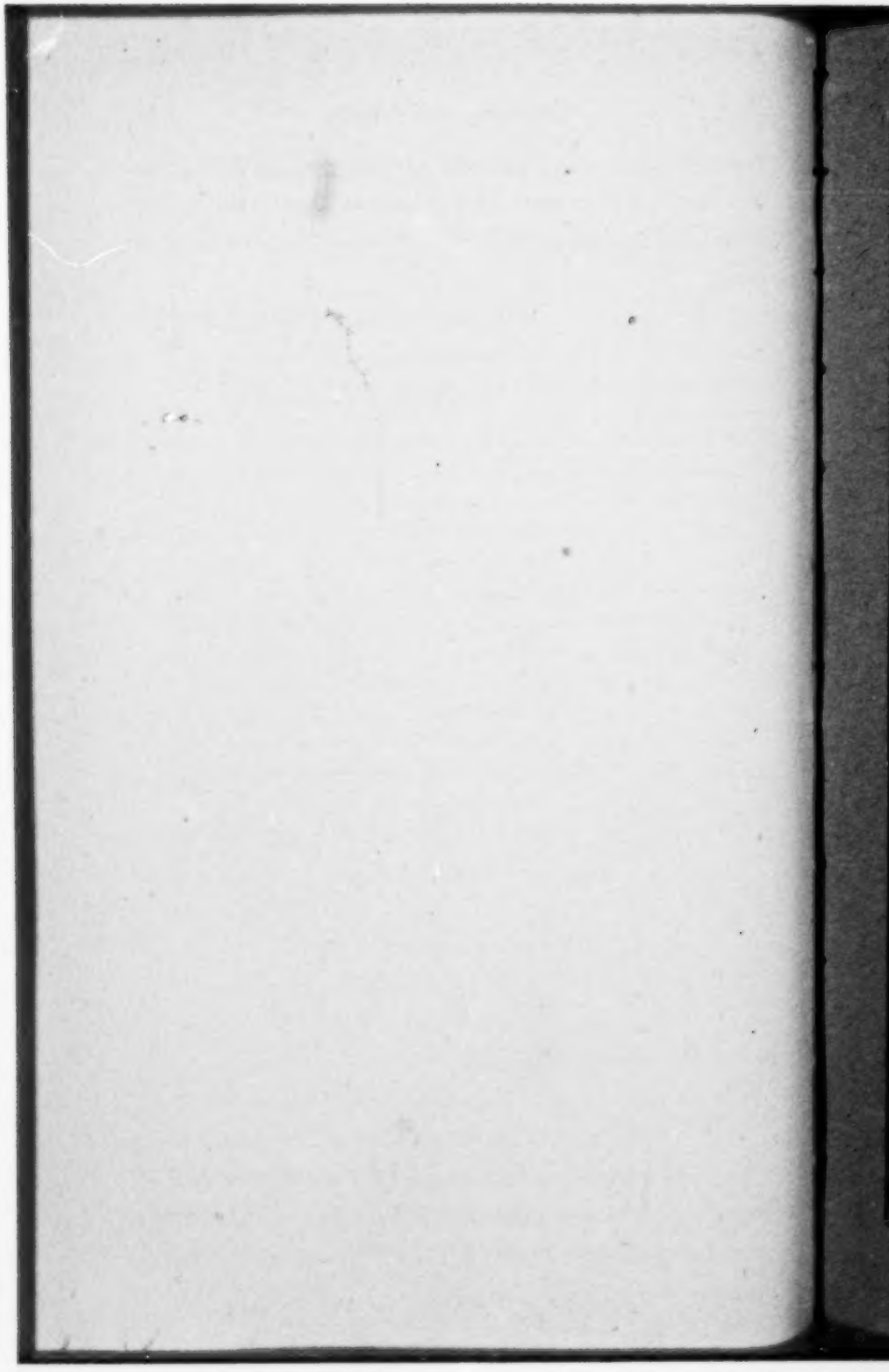
Counsel for Petitioner

To the above named Respondent, and to the United States Attorney General, counsel for respondent.

You will please take notice that on the 4th day of October, A. D., 1920, on the convening and sitting of the Honorable Supreme Court of the United States, or as soon

thereafter as counsel can be heard, the petitioner, Eugene Sol Louie, will present and submit to that Honorable Court, the foregoing motion to advance the above entitled cause.

ROBERT EARLY McFARLAND,
Coeur d'Alene, Idaho.
Counsel for Petitioner.



NO 9 837

In the

Supreme Court

of the

United States

October Term, 1919.

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals.

PETITION, BRIEF AND OPINIONS OF THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

ROBERT EARLY McFARLAND,
Counsel for Petitioner.

NO_____

In The

Supreme Court

Of The

United States

October Term, 1919.

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals.

PETITION, BRIEF AND OPINIONS OF THE UNITED STATES CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT

ROBERT EARLY McFARLAND,
Counsel for Petitioner.

TABLE OF CONTENTS.

In the Supreme Court of the United States.
October Term, 1919.

No.————

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, Eugene Sol Louie, respectfully represents, that on the 29th day of May, A. D. 1919, he was indicted in the District Court of the United States within and for the District of Idaho, Northern Division, at the May term thereof, for the crime of murder, and thereafter entered a plea of not guilty, and that on the 5th day of June, A D. 1919, his cause upon said charge was tried to a jury, and on the 7th day of June, 1919, the jury by its verdict found him guilty of murder in the second degree.

That during the progress of the trial, the testimony developed the facts, that your petitioner at the time of the commission of the alleged crime, was a member of the Coeur d'Alene tribe of Indians, but had been emancipated, and had received a patent in fee to certain lands situated within the boundaries of the Coeur d'Alene Indian Reservation in the State of Idaho, and had been adjudged and

declared competent by the duly qualified authorities of the Department of Indian Affairs of the United States, to conduct and transact his own affairs and business that; the crime of which he was charged and convicted occurred upon the lands theretofore patented to him in fee by the Government; that Adeline Bohn Sol Louie, whom he was charged and convicted with having killed, was his wife, and a ward of the government.

Upon these facts being shown conclusively by the evidence, your petitioner moved the trial court for a dismissal of the cause, which motion was denied. After verdict, and before judgment was pronounced, your petitioner made, filed, submitted and argued, a motion in arrest of judgment, which was denied, and thereupon, to-wit, on the 13th day of June, 1919, judgment was pronounced against him, adjudging that he be imprisoned in the United States penitentiary at McNeil's Island, Washington, for the term of twelve years; that thereafter and within the time provided by law, your petitioner sued out a writ of error from the Honorable United States Circuit Court of Appeals, Ninth Circuit, to said District Court, assigning as error, First, That "the indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States," and Second, That the court below was without jurisdiction of the person of the defendant, or of the crime charged, and had no jurisdiction

to try, hear or determine said cause.

The cause came duly and regularly on for hearing in the Honorable Circuit Court of Appeals of the United States at the October, 1919, term, and after oral argument by respective counsel, was submitted to the court.

That thereafter on to-wit, April 5, 1920, the Honorable United States Circuit Court of Appeals, by a majority of the Justices thereof, announced and handed down their opinion and decision dismissing said writ of error, and holding and deciding that that court was without jurisdiction to hear and determine said cause, and that your petitioner's writ of error should have been sued out of the Honorable Supreme Court of the United States.

The Honorable Justice Ross dissenting and by his opinion and decision announced, handed down and filed, held that that court had jurisdiction to hear and determine the cause, and that the lower court was without jurisdiction, and the judgment thereof should be reversed, and the case remanded with directions to dismiss the indictment.

Your petitioner believes that the aforesaid judgment of the Honorable Circuit Court of Appeals is erroneous and that this Honorable Court should require the said cause to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such case made and provided.

Your petitioner believes that the Honorable Circuit Court of Appeals, had jurisdiction to hear and determine his cause, and that it was error to dismiss his writ of er-

ror, and in addition to the question of the jurisdiction of the trial court to try, hear and determine his cause, there was submitted by the assignment of errors presented to the Honorable Circuit Court of Appeals, the question as to the sufficiency of the indictment, and the claim that the indictment was insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States, and your petitioner was entitled to have the Circuit Court of Appeals to pass upon the question of the insufficiency of the indictment.

Your petitioner therefore prays that a *writ of certiorari* be issued by this court directed to the said Circuit Court of Appeals for the Ninth Circuit, commanding the said Circuit Court to certify and send to this court on a day certain, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case, to the end that said case may be reviewed and determined by this court as provided in Section 240 of the Judicial Code of the United States, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate, and in conformity with law, and that said judgment of said Circuit Court of Appeals in said case, may be reversed by this Honorable Court.

EUGENE SOL LOUIE,
By ROBERT EARLY McFARLAND.
Counsel for Petitioner.

UNITED STATES OF AMERICA,

State of Idaho,
County of Kootenai. } ss.

Robert Early McFarland, being first duly sworn, on oath says: that he is the counsel for Eugene Sol Louie, the petitioner in the foregoing petition for certiorari; that he, the said Robert Early McFarland, prepared said petition, knows the contents thereof, and that the allegations thereof are true as he verily believes.

ROBERT EARLY McFARLAND.

Subscribed and sworn to before me this 3rd day of May, A. D. 1920.

(Seal) William B. McFarland

Notary Public in and for the State of Idaho, residing at Coeur d'Alene, Idaho.

My Commission expires July 29-1922.

Brief of Petitioner

No.————

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

It would be superflous to incorporate herein any lengthy statement of the facts, for they are enumerated in the petition, as well as in the record.

The petitioner relies upon two assignments of error only, viz: 1. That the indictment is insufficient, and, 2, That the trial court did not have jurisdiction of the person of petitioner, or of the cause. (Record p. 32.)

I will attempt to discuss these errors briefly in the order in which they occur. The indictment is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, or any offense under Section 273 of the Penal Code of the United States upon which it purports to be based. The indictment in no respect charges any specific degree of murder, and does not allege with what other deadly weapons than a knife or hammer the assault was committed, or the injuries from which the deceased died were inflicted, besides being in many other respects vague, uncertain and insufficient. (Record pp. 7, 8, 9).

As to the jurisdiction of the trial court, I point to the fact that the petitioner was a Coeur d'Alene Indian, a member of the Coeur d'Alene tribe of Indians, had been emancipated, had before the alleged commission of the crime charged, been declared competent by the Department of Indian Affairs of the United States to manage and transact his own affairs and business, and had received patent in fee from the government to certain lands within the boundaries of the Coeur d'Alene Indian Reservation; that the assault which resulted in the death of the deceased, whom petitioner was convicted of having murdered, was committed upon the lands patented to petitioner, and the deceased died upon other patented lands. The deceased was a ward of the government. Years ago a vast portion of the Coeur d'Alene Indian Reservation was thrown open to settlement and occupation by the white man, and white men acquired titles from the government to lands, therein, and resided upon their lands. All of these above mentioned facts are uncontradicted by the evidence and conceded by respondent.

The Act of May, 1906, c. 2348, (34 Stat. 182), provided:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal,

of the State or Territory in which they may reside, and no Territory shall pass or enforce any laws denying any such Indian within its jurisdiction the equal protection of the law. Provided, the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; Provided, further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; And provided further, That the provisions of this Act shall not extend to any Indians in the Indian territory."

Barnes Federal Code, p. 801, Section 35981.

The patent in fee issued by the government to petitioner was issued under the provisions of this section, and he received a different title than that issued to Celestine and discussed in United States v. Celestine, 215 U. S. 278 (which case is relied upon by respondent herein). He, petitioner, having an unconditional title in fee simple, one which cannot be cancelled, defeated or set aside by the

government, and unconnected with any restriction as to alienation, whereas, the title of Celestine was conditional and could have been forfeited. It was subject to cancellation by the President, and he was denied thereby the right of alienation. It would seem that the question of jurisdiction of the trial court depends wholly upon the construction of the Act above quoted, in which we find the following provision: "Provided further, that until the issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States."

The question naturally arises—After the issuance of fee simple patents, do not such allottees cease to be subject to the exclusive jurisdiction of the United States?

A number of courts have announced their opinion concerning the attitude of Congress towards Indians in the following language:

> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligations to perpetually continue the relationship of guardian and ward. It may, at

any time, abandon its guardianship, and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

I respectfully suggest that the dissenting opinion of Justice Ross, is an argument in favor of petitioner, and hereby refer this Honorable Court to the same.

Respectfully submitted,

ROBERT EARLY McFARLAND,
P. O. Address, Coeur d'Alene, Idaho.
Attorney for Petitioner.

Motion for Certiorari.

No.————

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Now comes Eugene Sol Louie, by Robert Early McFarland, his counsel, and moves this Honorable Court, that it shall by certiorari, or other proper processes directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the respondent, United States of America was defendant in error, and your petitioner, Eugene Sol Louie, was plaintiff in error, and said petitioner herewith tenders his petition and brief, together with a certified copy of the record of said cause in said Circuit Court of Appeals.

EUGENE SOL LOUIE,
By ROBERT EARLY McFARLAND,
Counsel for Petitioner.

Notice of Date of Submission of Petition.

No.————

EUGENE SOL LOUIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

To J. L. McClear, United States District Attorney, for the District of Idaho, and to the Honorable Attorney General of the United States of America:

You, and each of you will please take notice that on ~~Monday~~ Tuesday, the ~~31st~~ 1st day of ~~May~~ June, A. D. 1920, upon the opening of the above entitled court, or as soon thereafter as counsel can be heard, the foregoing petition and brief, together with certified copy of the entire transcript of the record in the above entitled cause, will be presented and submitted to the Supreme Court of the United States, in its court room in the Capitol at Washington, D. C., in pursuance of its rules in such cases made and provided.

Dated this 3rd day of May, A. D. 1920.

ROBERT EARLY McFARLAND,
Counsel for Petitioner.

No. 3380

United States
Circuit Court of Appeals
For the Ninth Circuit.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3380.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order of Submission.

ORDERED above-entitled cause argued by Mr. Ora A. McFarland, counsel for the plaintiff in error, and by Mr. James L. McClear, United States Attorney, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of April, in the year of our Lord, one thousand nine hundred and twenty Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3380.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order Directing Filing of Opinion and Dissenting Opinion and Filing and Recording of Judgment.

ORDERED, that the opinion this day rendered by this Court, as well as the Dissenting Opinion of the Honorable Erskine M. Ross, United States Circuit Judge, in the above-entitled cause be forthwith filed by the Clerk, and that a Judgment be filed, and recorded in the Minutes of this Court in said cause in accordance with said opinion.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Writ of Error to the United States District Court for the District of Idaho, Northern Division.

Before GILBERT, ROSS AND HUNT, Circuit Judges.

HUNT, *C. J.*

Sol Louie brought writ of error to review conviction of murder in the second degree for having killed Adeline Louie, a Coeur d'Alene Indian and a ward of the United States, about May 24, 1919, in Benewah County, Idaho, alleged to be in an Indian country within the limits of the Coeur d'Alene Indian Reservation in Idaho.

The indictment is drawn under section 328 of the Penal Code, 1910, which provides that any and all such Indians committing murder "against the person or property of another Indian or other person within the boundaries of any State of the United States and within the limits of any Indian Reservation, shall be subject to the same laws, tried in the

same courts and in the same manner and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It is alleged that Louie was a Coeur d'Alene Indian, who had theretofore been declared competent by the authorities of the Department of Indian Affairs and that he was a member of the Coeur d'Alene tribe of Indians, by reason of the fact that he then and there had, in common with all other members of said tribe, an interest in certain tribal funds thereafter to be disbursed to the members of said tribe, including Louie.

These facts appeared upon the trial. Louie was given a patent in fee to certain lands in the Coeur d'Alene Indian Reservation. Prior to receiving his patent he had a trust patent upon the land, the United States holding the land in trust for him. Adeline Louie was a ward of the Government and had never been declared competent and never had received any patent in fee for allotment. The land patented is within the boundaries of the Coeur d'Alene Indian Reservation as the limits of such reservation were prior to the time the last cession was made. There are no tribal lands on the Coeur d'Alene Reservation and all lands that had not been allotted were open to settlement on May 2, 1910. At the time of the assault the woman was living on the land that was patented to Louie, but her death occurred upon a lot which had been patented to another person. There were 18,000 acres of land which had never been settled upon and which were included

in the cession by the Coeur d'Alene tribe back to the United States, the Indians having an interest in these lands to the extent that they will get the money to accrue from the sale thereof. The land itself, however, is owned by the United States and is thrown open and platted by white people. What are called Indian lands now consist of the individual allotments in severalty to the members of the tribe and certain townsites on the reservation. By the cession of the 18,000 acres the Indians relinquished their rights to the land and when the patents are issued they are made direct to the purchasers from the United States. Louie has had his share of the one distribution already made of the proceeds of sales of part of the 18,000 acres. He lived on the land included in the allotment to him and had power to rent or sell the land. The patent to Louie was issued under the provisions of the Act of May 8th, 1906, (Ch. 2348, 34 Stat. 182), amending Section 6 of the Act of February 8th, 1887. It provides that at the expiration of the trust period and when the lands have been conveyed to the Indian by patent in fee, as provided by Section 5 of the Act, "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. . . . Provided the Secretary of the Interior, may in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her

affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuance of such patent; provided, further, that until the issuance of fee simple patents, all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; and provided, further, that the provisions of this Act shall not extend to any Indian in the Indian Territory." (Barnes Fed. Code, p. 801, Sec. 35,981.)

Counsel agree in their respective briefs that the only question presented by the record for determination is whether the District Court had jurisdiction of the crime charged and over the person of the defendant below.

In our opinion this court has no jurisdiction to review the judgment of the District Court. The question of the construction of that portion of the Act of March 3d, 1891 (26 Stat. 826, Sec. 238 Judicial Code, 1913), which provides that appeals and writs of error may be taken from the District Court direct to the Supreme Court in any case in which jurisdiction of the court is in issue, has often been considered, and the view which obtains is that in order that the Circuit Court of Appeals may entertain the writ of error there must be in the case something more than the question of jurisdiction. This Court so held in Excelsior Wooden Pipe Company vs. Pacific Bridge Co. et al., 109 Fed. 497. See, also, Halpin vs. Amerman, 138 Fed. 548; Boston & M. R. Co. vs.

Gokey, 149, Fed. 42; Smith vs. Farbenfabriken of Elberfeld Co., 203 Fed. 476. In United States ex rel. Butterwoth & Lowe vs. Sessions, Judge, 205 Fed. 502, the Court of Appeals for the Sixth Circuit said that where only a question of jurisdiction of the District Court is involved the Circuit Court of Appeals has no power either upon error or appeal to review the decision of the District Court. "The remedy lies exclusively in the Supreme Court. (Remington vs. Central Pacific R. Co., 198 U. S. 95, 97, 25 Sup. Ct. 577, 49 L. Ed. 959; Olds vs. Herman H. Hettler Lumber Co., 195 Fed. 9, 11, 115 C. C. A. 9k (C. C. A. 6th Cir.); Coler vs. Grainger County, 74 Fed. 16, 21, 20 C. C. A. 267 (C. C. A. 6th Cir.); Loveland, App. Jur., Sec. 103, p. 222); but if the case should be tried on its merits in the court below, and brought to this court with assignments of error raising an independent question of general law, this court would have power to hear and determine all the questions (see cases cited, and A. J. Phillips Co. vs. Grand Trunk Western Ry. Co., 195 Fed. 12, 15; 115 C. C. A. 94 (C. C. A. 6th Cir.); Smith vs. Farbenfabriken of Elberfeld Co., (C. C. A.), 203 Fed. 476, 478, (C. C. A. 6th Cir.)." Hammond Lumber Co. vs. U. S. District Court, 240 Fed. 924; Great Northern R. Co. vs. Blaine County, 252 Fed. 548.

The writ must be dismissed for lack of jurisdiction. Dismissed.

[Endorsed]: Opinion. Filed April 5, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Dissenting Opinion of Ross, C. J.

ROSS, Circuit Judge, Dissenting:

I am unable to agree to the judgment dismissing the writ of error for lack of jurisdiction in this court, in view of the fact that the record shows that the first assignment of error is in these words:

> "The indictment herein is insufficient and does not state facts sufficient to constitute or charge any crime against the laws of the United States of America, nor any offense under Section 273 of the Penal Code of the United States."

Subsequent assignments of error are to the effect that the Court below was without jurisdiction of the person of the defendant or of the crime charged.

In view of the first assignment of error above quoted, I am unable to understand how it can be properly said and held that the plaintiff in error intended by his assignments to raise no other question than the question of jurisdiction of the Court below. If the Court below did have jurisdiction of the defendant and of the crime charged, would not this

Court be obliged, in the event it should be of the opinion that the indictment did not state facts sufficient to constitute the alleged crime, to reverse the judgment? It seems to me that there can be but one answer to that. And because it is manifest from a reading of the indictment that it *does* state facts sufficient to constitute the alleged crime, is that any legal or just reason why the Court should hold that the plaintiff in error did not intend by his assignment to present the question of the sufficiency of the indictment? In my opinion, surely not.

I therefore think it clear that the record brought here presents both the question of the sufficiency of the indictment and of the jurisdiction of the Court below. And being of the further opinion that the Court below was without jurisdiction, I think the judgment should be reversed and the case remanded with directions to dismiss the indictment.

The Act of Congress of May 8, 1906 (34 Stat. 182), under which the plaintiff in error was allotted and received a patent in fee for his piece of land expressly declares that each and every such allottee shall have the benefit of and be subject to the laws, both civil and *criminal*, of the State or Territory in which he may reside; and that the purpose of such provision was to thereafter exclude such an allottee from the operation of the criminal laws of the United States seems to be emphasized by the proviso to section 6 of the same Act, in which proviso it is expressly declared that *until the issuance of such fee simple patents* all allottees for whom a trust patent should thereafter be issued shall be subject to the

exclusive jurisdiction of the United States. In the Celestine Case (215 U. S. 278) there was not in the statute there involved, as there is in the one here involved, as will be seen near the conclusion of the Court's opinion on page 291, "a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

[Endorsed]: Dissenting Opinion of Ross, C. J. Filed April 5, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Idaho, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the writ of error in this cause be, and hereby is dismissed for the lack of jurisdiction.

[Endorsed]: Judgment. Filed and entered. April 5, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3380.

EUGENE SOL LOUIE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record, Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-three (53) pages, numbered from and including 1 to and including 53, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 27th day of April, A. D. 1920.

[Seal] F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

on behalf of the United States of America, defendant in error.

J. L. McCLEAR,
United States District Attorney,
Attorney for the United States.

Endorsed: Filed Aug. 2, 1919.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR RECORD.

To W. D. McReynolds, Clerk of the above entitled court:

You are hereby respectfully required to transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, a printed transcript of the following papers constituting the record in this action on appeal, viz., indictment, plea of not guilty to indictment, verdict of the jury, defendant's bill of exceptions, motion in arrest of judgment, judgment, objection to introduction of further testimony, and motion to dismiss case, made during progress of trial, and all appeal papers, with the original Citation and Writ of Error.

McFARLAND & McFARLAND,
and R. E. McFARLAND,
Attorneys for Defendant.
P. O. Address: Coeur d'Alene, Idaho.

Endorsed: Filed July 21, 1919.
W. D. McREYNOLDS, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit and the same is transmitted accordingly.

W. D. McREYNOLDS,
(Seal) Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 40, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as Requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $48.35, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 9th day of August, 1918.

W. D. McREYNOLDS,
(Seal) Clerk.

[Endorsed]: Printed Transcript of Record. Filed August 15, 1919. F. D. Monckton, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

EUGENE SOL LOUIE, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION.

STATEMENT OF CASE.

Petitioner, an Indian, was indicted in the district of Idaho for the murder of another Indian within the limits of an Indian reservation in violation of section 328, Criminal Code (R. 7–9). *No demurrer was filed to the indictment.* He was arraigned, pleaded not guilty (R. 10, 11), was convicted of murder in the second degree (R. 12), and was sentenced to 12 years in the penitentiary (R. 15, 16). At the outset of the trial he moved to dismiss the cause for want of jurisdiction, the motion being denied (R. 11, 12); at the close of the Government's testimony he made the same motion, with the same result (R. 22, 26); and he moved in arrest of judgment solely on the same ground and with the like result (R. 13, 14, 27–29). He then sued out a writ

of error from the Circuit Court of Appeals for the Ninth Circuit, and assigned as errors (R. 32–35) only the action of the district court in assuming jurisdiction; except that in the first assignment of error he complained generally that the indictment did not state facts sufficient to constitute or charge any crime against the laws of the United States, nor any offense under section 273 of the Criminal Code (which, by the way, was not the statute involved).

Looking at the indictment entirely apart from the question of jurisdiction, it charged that the petitioner, an Indian, on a day certain, in the northern division of the District of Idaho, within the limits of the Cœur d'Alene Indian Reservation, unlawfully, willfully, and with malice aforethought made an assault upon another named Indian with a knife, hammer, and other deadly weapons to the grand jurors unknown, and unlawfully, willfully, and with malice aforethought struck the said Indian, inflicting upon her head mortal wounds, of which she then and there died.

The Court of Appeals, Judge Ross dissenting, held that the only question raised before them on the record was that as to the jurisdiction of the trial court. Therefore, under sections 238 and 128, Judicial Code (secs. 5 and 6 of the act of Mar. 3, 1891, c. 517, 26 Stat. 827), this court had exclusive jurisdiction and consequently the Court of Appeals had none. The writ of error was dismissed, and the present application asks a review of this action.

ARGUMENT.

In *United States* v. *Jahn*, 155 U. S. 109, 114, 115, the Chief Justice, delivering the opinion of the court, construed sections 5 and 6 of the act of March 3, 1891, c. 517, in so far as they relate to the question of the jurisdiction of the trial court, as follows:

> Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ or error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court or *to carry the whole case* to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of

> cross appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone; and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits. [Italics ours.]

The present case falls within class (3) above. The petitioner, therefore, had an election either to bring the jurisdictional question directly to this court or *to take the whole case* to the Court of Appeals, in which event the latter court would have authority to pass on the question of jurisdiction *along with the other questions.* (*Boston & Maine R. R.* v. *Gokey*, 210 U. S. 155, 161, 162; *Tang Tun* v. *Edsell*, 223 U. S. 673, 682; *Blandin* v. *Ostrander*, 239 Fed. 700, 703 (C. C. A. 2d)). Where, however, the whole case is not taken to the Court of Appeals, but only the jurisdictional question, that court can not pass upon it. (*Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co.* v. *Raton*, 249 U. S. 552.) Furthermore, and with special reference to the present petition, the election to take the whole case to the Court of Appeals must be exercised in good faith and substantially. The questions, other than that relating to the jurisdiction, must be "raised upon the record" (Taft, J., in *Coles*

v. *Grainger County*, 74 Fed. 16, 21); they must be "properly raised by the assignments of error" (Denison, J., in *Olds* v. *Lumber Co.*, 195 Fed. 9, 11).

Applying these principles to the present case it is clear that the majority of the Court of Appeals was right in its decision. The only claim to the contrary is that the first assignment of error, as stated above, alleged generally that the indictment did not state facts sufficient to show a Federal offense, and therefore attacked it on other grounds than the jurisdictional one. The petitioner, however, never questioned the indictment in the trial court in any manner or on any ground whatsoever, except solely that it did not show jurisdiction. The first assignment of error is evidently directed to the same point, as is shown by its alternative reference to section 273 Criminal Code. The majority opinion recites:

> Counsel agree in their respective briefs that the only question presented by the record for determination is whether the District Court had jurisdiction of the crime charged and over the person of the defendant below.

Even if that be not true, this assignment is too vague in its allegations to constitute a substantial bona fide attempt to raise other questions than the jurisdictional one. All that the petitioner can specify in regard to it (brief, p. 10) is that the indictment does not charge any specific degree of murder, and that it does not allege with what deadly weapon other than a knife or hammer the assault was committed. These objections are, of course, wholly

frivolous and unsubstantial. The former is precisely covered by *Davis* v. *Utah*, 151 U. S. 262, 266, 267; and the latter is covered on principle by *Westermoreland* v. *United States*, 155 U. S. 545, 549; *Anderson* v. *United States*, 170 U. S. 481, 499–501; and *Fitzpatrick* v. *United States*, 178 U. S. 304, 309, 310. (See also *Wharton on Homicide*, 3d ed., secs. 565 and 566.) They are clearly afterthoughts of counsel and are not sufficient to show a substantial attempt to raise on the record in the Court of Appeals questions other than that of the jurisdiction of the trial court. They are of the species of defects, which, if made out (as they are not), would be cured by section 1025, R. S., and not therefore of a character which a court of error would notice, although they had not been pointed out or excepted to in any way in the trial court.

It follows that the Court of Appeals was correct in holding that no other question was raised on the record before it than that of the jurisdiction of the trial court, as to which a writ of error could issue only from this court; and that this petition should therefore be denied.

ROBERT P. STEWART,
Assistant Attorney General.
W. C. HERRON, *Attorney.*

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

EUGENE SOL LOUIE, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 337.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

Petitioner, an Indian, was indicted in the District of Idaho for the murder of another Indian within the limits of an Indian reservation in violation of section 328, Criminal Code (R. 7–9). *No demurrer was filed to the indictment.* He was arraigned, pleaded not guilty (R. 10, 11), was convicted of murder in the second degree (R. 12), and was sentenced to 12 years in the penitentiary (R. 15, 16). At the outset of the trial he moved to dismiss the cause for want of jurisdiction, the motion being denied (R. 11, 12); at the close of the Government's testimony he made the same motion, with the same result (R. 22, 26); and he moved in arrest of judgment solely on the same ground and with the like result (R. 13, 14, 27–29). He then sued out a writ of error from the Circuit

Court of Appeals for the Ninth Circuit, and assigned as errors (R. 32–35) only the action of the district court in assuming jurisdiction; except that in the first assignment of error he complained generally that the indictment did not state facts sufficient to constitute or charge any crime against the laws of the United States, nor any offense under section 273 of the Criminal Code (which, by the way, was not the statute involved).

Looking at the indictment entirely apart from the question of jurisdiction, it charged that the petitioner, an Indian, on a day certain, in the Northern Division of the District of Idaho, within the limits of the Coeur d'Alene Indian Reservation, unlawfully, willfully, and with malice aforethought made an assault upon another named Indian with a knife, hammer, and other deadly weapons to the grand jurors unknown, and unlawfully, willfully, and with malice aforethought struck the said Indian, inflicting upon her head mortal wounds, of which she then and there died.

The Court of Appeals, Judge Ross dissenting, held that the only question raised before them on the record was that as to the jurisdiction of the trial court. Therefore, under sections 238 and 128, Judicial Code (sections 5 and 6 of the act of Mar. 3, 1891, c. 517, 26 Stat. 827), this court had exclusive jurisdiction and consequently the Court of Appeals had none. The writ of error was consequently dismissed.

ARGUMENT.

In *United States* v. *Jahn*, 155 U. S. 109, 114, 115, the Chief Justice, delivering the opinion of the court, construed sections 5 and 6 of the act of March 3, 1891, c. 517, in so far as they relate to the question of the jurisdiction of the trial court, as follows:

> Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant *can elect* either to have the question certified and come directly to this court or *to carry the whole case* to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross appeal or writ of error if the defendant has

> taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone; and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits. [Italics ours.]

The present case falls within class (3) above. The petitioner, therefore, had an election either to bring the jurisdictional question directly to this court or *to take the whole case* to the Court of Appeals, in which event the latter court would have authority to pass on the question of jurisdiction *along with the other questions*. (*Boston & Maine R. R.* v. *Gokey*, 210 U. S. 155, 161, 162; *Tang Tun* v. *Edsell*, 223 U. S. 673, 682; *Blandin* v. *Ostrander*, 239 Fed. 700, 703 (C. C. A. 2d)). Where, however, the whole case is not taken to the Court of Appeals, but only the jurisdictional question, that court can not pass upon it. (*Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co.* v. *Raton*, 249 U. S. 552.) Furthermore, and with special reference to the present petition, the election to take the whole case to the Court of Appeals must be exercised in good faith and substantially. The questions, other than that relating to the jurisdiction, must be "raised upon the record" (Taft, J., in *Coles* v. *Grainger County*, 74 Fed. 16, 21); they must be "properly raised by the assignments of error" (Denison, J., in *Olds* v. *Lum-*

ber Co., 195 Fed. 9, 11). Applying these principles to the present case, it is clear that the majority of the Court of Appeals was right in its decision. The only claim to the contrary is that the first assignment of error, as stated above, alleged generally that the indictment did not state facts sufficient to show a Federal offense, and therefore attacked it on other grounds than the jurisdictional one. The petitioner, however, never questioned the indictment in the trial court in any manner or on any ground whatsoever, except solely that it did not show jurisdiction. The first assignment of error (R. 14) is evidently directed to the same point, as is shown by its alternative reference to section 273, Criminal Code. The majority opinion recites (R. 22):

> Counsel agree in their respective briefs that the only question presented by the record for determination is whether the District Court had jurisdiction of the crime charged and over the person of the defendant below.

It thus clearly appears that substantially the only question raised at the trial, and on error, was the jurisdiction of the trial court. Even if the first assignment of error can be taken to refer to something else than the jurisdiction of the trial court, it is too vague in its allegations to constitute a substantial bona fide attempt to raise other questions than the jurisdictional one. All that the petitioner can specify in regard to it is that the indictment does not charge any specific degree of murder, and that it does not allege with what deadly weapon

other than a knife or hammer the assault was committed. These objections are, of course, wholly frivolous and unsubstantial. The former is precisely covered by *Davis* v. *Utah*, 151 U. S. 262, 266, 267; and the latter is covered on principle by *Westmoreland* v. *United States*, 155 U. S. 545, 549; *Anderson* v. *United States*, 170 U. S. 481, 499–501; and *Fitzpatrick* v. *United States*, 178 U. S. 304, 309, 310. (See also *Wharton on Homicide*, 3d ed., secs. 565 and 566.) They are clearly afterthoughts of counsel and are not sufficient to show a substantial attempt to raise on the record in the Court of Appeals questions other than that of the jurisdiction of the trial court. They are of the species of defects which, if made out (as they are not), would be cured by section 1025, R. S., and not therefore of a character which a court of error would notice when they had not been pointed out or excepted to in any way in the trial court.

It follows that the Court of Appeals was correct in holding that no other question was raised on the record before it than that of the jurisdiction of the trial court, as to which a writ of error could issue only from this court; and in therefore dismissing the writ of error.

CONCLUSION.

It is respectfully submitted that the judgement should be affirmed or, if the court should be of opinion that the Circuit Court of Appeals had jurisdiction, remanded to the end that that court may

determine the case as there presented. (See *Lutcher* v. *Knight*, 217 U. S. 257, 267, 268.)

WILLIAM L. FRIERSON,
Solicitor General.
R. P. STEWART.
Assistant Attorney General.
W. C. HERRON,
Attorney.

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LOUIE *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 337. Argued December 8, 1920.—Decided January 17, 1921.

Upon an indictment of an Indian for the murder of another Indian within the limits of an Indian Reservation (Crim. Code, §§ 273, 328), an objection that the District Court has no jurisdiction over person or subject-matter because the defendant had been declared competent and because the act charged was committed on land which had been allotted and deeded to him in fee simple, really goes, not to the jurisdiction, but to the merits, raising the question whether the act was a violation of the federal law; and the judgment of the District Court is not reviewable by direct writ of error from this court, but should go to the Circuit Court of Appeals. P. 550. *Clairmont* v. *United States*, 225 U. S. 551, explained.

Reversed.

THE case is stated in the opinion.

Mr. William B. McFarland, with whom *Mr. Robert Early McFarland* was on the brief, for petitioner.

Mr. W. C. Herron, with whom *The Solicitor General* and *Mr. Assistant Attorney General Stewart* were on the brief, for the United States.

Mr. Justice Brandeis delivered the opinion of the court.

Louie, an Indian, was indicted under § 273 of the Penal Code in the District Court of the United States for the District of Idaho, Northern Division, for the murder of another Indian within the limits of the Coeur d'Alene Reservation. A motion to dismiss for want of jurisdiction was overruled and the defendant was tried and convicted. By motion in arrest of judgment, he objected in terms to the jurisdiction of the court over the person of defendant and over the crime charged on the ground that before the time of the alleged crime he had been declared competent and the land on which the crime was alleged to have been committed had been allotted and deeded to him in fee simple. Compare *United States* v. *Celestine*, 215 U. S. 278. This motion also was overruled; the defendant was sentenced; and the case was taken on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. That court, one judge dissenting, dismissed the writ of error for want of jurisdiction on the ground that, since the sole question presented was whether the District Court had jurisdiction, its decision could be reviewed only by direct writ of error from this court to the District Court. See *United States* v. *Jahn*, 155 U. S. 109, 114, 115; compare *Raton Water Works Co.* v. *City of Raton*, 249 U. S. 552. The dissenting judge was of opinion that the Circuit Court of Appeals had jurisdiction of the writ of error, because an additional error relating to the merits had been assigned there, although not raised below.

A writ of certiorari was granted by this court. 253 U. S. 482.

We have no occasion to consider the question on which the Circuit Court of Appeals divided. The motions made by defendant in the District Court raised a question not of the jurisdiction of that court, but of the jurisdiction of the United States. The contention was, in essence, that, by reason of the facts set forth in the motions, the defendant was in respect to the acts complained of subject to the laws of the State of Idaho and not to the laws of the United States. In other words that he did not violate the laws of the United States. Compare *United States* v. *Kiya*, 126 Fed. Rep. 879, 880. Section 328 of the Penal Code provides that an Indian committing murder on another Indian "within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same penalties as are all other persons committing" the same crime "within the exclusive jurisdiction of the United States." *United States* v. *Kagama*, 118 U. S. 375; *Donnelly* v. *United States*, 228 U. S. 243, 269, 270. The defendant, in effect, denied that the killing was, in the statutory sense, within the reservation. If this was true an essential element of the crime against the United States was lacking; as much so as if it had been established in *United States* v. *Sutton*, 215 U. S. 291, or in *United States* v. *Soldana*, 246 U. S. 530, that the region into which liquor was introduced was not Indian country. That the District Court for Idaho had jurisdiction to determine whether the *locus in quo* was a part of the reservation was not questioned. By § 78 of the Judicial Code the whole State of Idaho is comprised within the District of Idaho; by paragraph second of § 24 district courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States; and the defendant was arrested within the District of Idaho.

Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court but went to the merits, there was no basis for a direct writ of error from this court. *Pronovost* v. *United States*, 232 U. S. 487; *Lamar* v. *United States*, 240 U. S. 60, 65. He properly sought review in the Circuit Court of Appeals. In *United States* v. *Celestine*, 215 U. S. 278, and *United States* v. *Pelican*, 232 U. S. 442, where the defense was similar to that presented here, and in *United States* v. *Sutton*, *supra*, and *United States* v. *Soldana*, *supra*, the cases came to this court by direct writ of error to the District Court under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246. *Hallowell* v. *United States*, 221 U. S. 317, where a similar question was involved, came here on certificate. In *Clairmont* v. *United States*, 225 U. S. 551, 554, it was inadvertently assumed without discussion that the question involved was one of the jurisdiction of the District Court.

The judgment of the Circuit Court of Appeals is reversed and the case remanded to that court for further proceedings in conformity with this opinion.

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.